

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
NORTHERN DIVISION

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CALEB NUQUAY MACKEY,

Petitioner,

Case No. 2:19-cv-203

v.

Honorable Hala Y. Jarbou

CONNIE HORTON,

Respondent.

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**ORDER DENYING IN FORMA PAUPERIS STATUS**

Petitioner has filed a notice of appeal from “the final judgment dismissing his habeas corpus petition.” (ECF No. 26, PageID.1211.) No final judgment has been entered. Instead, Petitioner has filed an interlocutory appeal of the report and recommendation entered by the Magistrate Judge.

Federal Rule of Appellate Procedure 3(e) provides that the appellant must pay all required fees at the time a notice of appeal is filed with the district court. Under Sixth Circuit Internal Operating Procedure 3, the docketing fee for a case on appeal is \$500.00. In addition, under 28 U.S.C. § 1917, a \$5.00 filing fee must be paid to the district court. Petitioner has failed to pay the fees.

The Sixth Circuit has determined that “a prisoner who is unable to pay the required filing fees may seek leave to file an appeal in a Section 2254 or Section 2255 action pursuant to Rule 24(a) of the Federal Rules of Appellate Procedure.” *Kincade v. Sparkman*, 117 F.3d 949, 952 (6th Cir. 1997). But, under Rule 24(a)(3) and 28 U.S.C. § 1915(a)(3), where the Court has

certified that an appeal would not be taken in good faith, Petitioner is not authorized to proceed on appeal *in forma pauperis*.

Western District of Michigan Local Rule 72.3 provides for review of case dispositive reports and recommendation in prisoner litigation by the district judge upon timely objection by any party. The report and recommendation itself is not dispositive of any claim; rather the district judge's order adopting, rejecting, or modifying the report and recommendation—and the accompanying judgment—dispose of the case.

Neither the United States Code nor the Federal Rules of Civil Procedure provide for review of a report and recommendation by appeal to the United States Court of Appeals. Indeed, Petitioner could only appeal something other than a final judgment to the Sixth Circuit with special permission under 28 U.S.C. § 1292. Petitioner has not sought such permission and it would not be appropriately given here because the report and recommendation does not involve a “controlling question of law as to which there is substantial ground for difference of opinion” and an immediate appeal would not “materially advance the ultimate termination of the litigation.” 28 U.S.C. § 1292(b).

Because Petitioner seeks to appeal a non-appealable report and recommendation and because he seeks to pursue an interlocutory appeal without permission, the Court concludes that the appeal is frivolous. *Coppedge v. United States*, 369 U.S. 438, 445 (1962). Therefore, the Court certifies that the appeal would not be taken in good faith. Under 28 U.S.C. § 1915(b)(3), Petitioner may not proceed on appeal *in forma pauperis* if the Court certifies that an appeal would not be taken in good faith.

If Petitioner wishes to proceed with his appeal, Petitioner is informed that within 28 days from the date of this notice he must pay the \$505.00 appellate fee to the Clerk of this

Court. *See* 28 U.S.C. §§ 1913, 1917; 6 Cir. I.O.P. 3; Court of Appeals Miscellaneous Fee Schedule § 1 (Dec. 1, 2013). Alternatively, Petitioner may file a motion for leave to proceed *in forma pauperis* in the Court of Appeals pursuant to the requirements set forth in Fed. R. App. P. 24(a)(5). Petitioner is also notified that if he fails to pay the filing fee or to file the required documents, the Court of Appeals may dismiss Petitioner's appeal for want of prosecution.

Accordingly,

**IT IS ORDERED** that Petitioner is **DENIED** leave to proceed on appeal *in forma pauperis*.

Dated: September 23, 2021

/s/ Hala Y. Jarbou  
HALA Y. JARBOU  
UNITED STATES DISTRICT JUDGE

**SEND REMITTANCES TO:**

Clerk, U.S. District Court  
399 Federal Bldg.  
110 Michigan St., N.W.  
Grand Rapids, MI 49503

**All checks or other forms of payment shall be payable to "Clerk, U.S. District Court" and must indicate the case number in which the payment is made.**